THE DOCTRINE OF AN INHERENT RIGHT OF LOCAL SELF-GOVERNMENT.

II. An analysis of the legal principles and historical facts involved.

It would be folly to deny that in a general way the principle of local self-government is one of those principles that lie at the foundation of American political institutions. Of like character are the principles of democracy, of representative government, of civil liberty, and of the tripartite separation of governmental powers. These are principles, or doctrines, of our political theory which, to the extent that they have been incorporated into our fundamental laws, have found more or less concrete expression in our institutional life and development. But not one of these principles has been completely realized in the practical operation of our institutions, partly for the reason that our constitutions have never attempted their complete establishment, and partly for the reason that our government, like all governments, is one of men as well as of laws. It is therefore a legal doctrine of no trivial significance which asserts that an abstract political theory—no matter how important a place it may occupy in the philosophy of our politics—may by the courts be translated into a positive legal right, wholly in the absence of any constitutional provision giving substantial expression to the theory. It seems worth while, in consequence, to subject to somewhat critical examination the arguments that have been advanced in support of the doctrine of an inherent right of local self-government.

In a previous paper[1] it was shown that this doctrine has been actually applied in a very limited number of American cases. From the analysis of opinions that was made in that connection it may doubtless be said that the doctrine has been rested upon one or more of the following grounds:

1. That municipal corporations in England were of common law origin, that their charters were a confirmation of existing rights and not a grant of wholly new rights; and that municipal corporations in the United States, being a development from

[1] 16 Columbia Law Rev. 190.

similar institutions in England, must be conceived to be of similar origin.[2]

2. That the institutional history of the American colonies discloses the fact that organized local governments either antedated organized central governments or that the two were synchronously established and ran parallel with each other; and that in consequence the "rights" of local government cannot be said to have sprung from the central government.[3]

3. That at the time of the framing of the first state constitutions a system of local self-government was thoroughly understood and tolerably uniform; that these constitutions were framed with this system in view and with the expectation of its continuous existence; and that it is in consequence fair to presume that the principles of this system (involving among other rights the right to have local officers locally chosen) were intended to be incorporated into these constitutions by general implication.[4]

4. That the right of local self-government is one of those rights embraced within that well-known reserve clause of constitutional bills of rights which declares that "this enumeration of rights shall not be construed to impair or deny others retained by the people."[5]

The soundness and applicableness of these several grounds of support may be considered in their order of statement.

1. Whatever may be admitted in respect to the historical soundness of the theory that the rights of municipal corporations in the United States must be regarded as of common law origin, it is certainly a new doctrine in this country that a right founded in the common law but not incorporated expressly or by specific implication into the constitution of a State is nevertheless wholly beyond the power of the legislature to alter, or abolish. The answer to such a contention is, as everyone knows, that any and every principle of the common law, unless it is rendered static by some constitutional provision, is subject to statutory modification or abolishment. It is true that "statutes in derogation

[2] *Ibid.*, p. 193, note 10; pp. 213, 214.
[3] *Ibid.*, pp. 190, 191.
[4] *Ibid.*, pp. 194, 199.
[5] *Ibid.*, p. 202.

of the common law must be strictly construed." But where legislative enactments have been invalidated on the ground that they have violated some established principle of the common law it will be found that courts have held the common law principle in question to be incorporated expressly or impliedly into some general or specific provision of the constitution.[6] In other words, the principles of the common law are without question frequently relied upon by the courts in interpreting a specific term, phrase, or clause of the fundamental law. But it would be difficult, if not impossible, to find a single case (outside of certain of those in which the existence of an inherent right of local self-government has been asserted) in which the courts have given expression to the opinion that a right or franchise, *merely because of its common law origin,* and wholly apart from any express or implied constitutional guarantee, is securely and in perpetuity fortified against legislative encroachment.

2. It seems unnecessary to enter upon an extended historical investigation to support or disprove the assertion that in point of time local governments in the American colonies were established prior to, or synchronously with, central governments. Owing to the exigencies of settlement it is probably true that "in most of the New England colonies some of the towns were older than the central government; and in Connecticut and Rhode Island the latter was considered more as a federation of towns than as a superior sovereign authority."[7] On the other hand, in most of the other colonies organization was first given to the local governments by the central government.[8] Whatever may be the facts of history in respect to this matter, such facts have no bearing upon the doctrine of an inherent right of local self-government except as they may be adduced for one of two purposes: first, to sustain the common law origin of the right of local self-government; or second, to support the contention that this right, not having sprung from the central government, must not be regarded

[6]See as a typical example Ives *v.* South Buffalo Ry. (1911) 201 N. Y. 271, 94 N. E. 431. The rights of indictment by grand jury and trial by petit jury are unquestionably rights of common law origin but they do not remain substantive rights in the absence of specific constitutional guarantee. In the opinion of the United States Supreme Court they are not even implied in the general constitutional guarantee of due process of law. Hurtado *v.* California (1883) 110 U. S. 516, 4 Sup. Ct. 111; Maxwell v. Dow (1899) 176 U. S. 581, 20 Sup. Ct. 448.

[7]Fairlie, Local Government in Counties, Towns and Villages, p. 21.

[8]*Ibid.,* Ch. II.

as subject to the will and authority of that government unless it can be shown that it has been expressly yielded up. The absolute subordination to the will of the legislature of any and all rights originating in the common law has already been discussed. The other contention must rest for its support upon a theory of politics very closely akin to the long exploded contract or compact theory of the origin of the State.[9] As well might the western pioneer of earlier days have claimed, that, having been a law unto himself before the establishment of organized government over him, he retained all rights over against such government, when it was established, except such as he expressly agreed to concede. As well might the communities which sprang into existence and organized provisional governments in Oklahoma upon the opening up of land for settlement in 1889 claim the right to dictate to the territorial government established by act of Congress nearly a year later in respect to the local powers which they might elect to enjoy.[10]

But apart from theory and in line with law, it is perfectly obvious that if a positive surrender of the "rights" of local self-government must be found in order to justify the authority of the legislature to interfere with the exercise of such rights, the courts must of necessity seek this surrender in the fundamental law of the State.[11] This would mean that, so far as the rights of municipal corporations are concerned, the courts must refuse to apply the most fundamental, universal, and all comprehensive principle of our state constitutional law—a principle that has been laid down from the beginning of our history as a nation and has through the course of our institutional development been subjected to little or no strain. That principle is nowhere more adequately put than by Judge Cooley himself. "The state constitutions," he says, "are not grants of power to the state, but instruments which apportion and distribute governmental authority and impose restrictions upon governmental action for the protection of the individual or for the welfare of the people. And the legislative department is possessed of all legislative power not prohibited by the constitution explicitly or impliedly, or by the restrictions contained in the federal constitution."[12] To main-

[9]Willoughby, Nature of the State, pp. 115-118.

[10]For the facts in respect to these provisional governments see Guthrie National Bank *v.* Guthrie (1899) 173 U. S. 528, 19 Sup. Ct. 513.

[11]16 Columbia Law Rev. 199.

[12]Cooley, Principles of Constitutional Law (3rd ed.) p. 386.

tain, therefore, that a surrender of the "rights" of local self-government must be found in an express or clearly implied grant of authority to the state legislature is merely to assert that the powers of the legislature are in this respect wholly exceptional and peculiar. It is to declare that with respect to local governments the state legislature enjoys *not* such powers as it is not *denied* but only those powers that are *conferred* upon it by expression or by specific implication.

It is needless to say that to the average judicial mind much stronger arguments than those based upon the wholly fortuitous circumstances of early settlement would have to be presented in order to justify the refusal to apply to the determination of the constitutional authority of the legislature over municipal corporations a canon of judicial construction that is subject to no other exception in our system of jurisprudence. It seems reasonable to conclude, therefore, that the matter of priority of establishment as between local and central governments in the American colonies has, and can have, no possible bearing upon the existence of a legal right of local self-government in the United States.

3. In order to test the soundness of the contention that, having in view a system of local self-government that was thoroughly understood and tolerably uniform, the framers of our early state constitutions intended that the principles of this system should be incorporated into these constitutions by general implication, it is necessary to give attention to several important considerations.

No one will deny, probably, that from the very beginning all of our constitutions have been framed with a system of local government in view. We should do small credit to the intelligence and observational capacity of the makers of American constitutions were we to assume anything else. Doutbless, also, even the early constitutions were framed with the expectation of the continued existence in one form or another of local bodies politic. The assertion, however, that the existing system of local government was well understood and reasonably uniform is open to very serious question. In New England the system of town government was indeed fairly uniform, but the county in Massachusetts and New Hampshire occupied a far more important position in the general scheme of government than it assumed in Connecticut and Rhode Island. In New York and New Jersey the systems of county government were somewhat similar, and in each the town was a more or less important factor in the

county organization. But in Pennsylvania and Delaware the town was an almost negligible unit of government, while the administrative organization of the county was quite different from that which prevailed in the other middle colonies. In Virginia and the other Southern colonies the town was non-existent, and while the county was everywhere the principal unit of local government, it was by no means organically and functionally uniform from colony to colony.[13] As for municipal corporations proper—that is, cities or boroughs—there were in existence at the close of the colonial period none in New England, three in New York, four in New Jersey, four in Pennsylvania, one in Maryland, three in Virginia, and one in North Carolina.[14] In the charters of these colonial corporations there were unquestionably innumerable important variations.[15]

For our purposes here it seems wholly unnecessary to examine in detail the characteristics of the several forms of local government that arose in the American colonies. Suffice it to point out that it is at least open to debate whether it can be said that a "reasonably uniform" system of local government prevailed. Indeed, it would probably not be difficult to show that the "system" —if such it can be called—embodied almost as much of dissimilarity and vagary as of similarity and uniformity.

Of far more importance, however, than this lack of uniformity in the matter of early as of present-day local governments are the easily ascertainable facts of history in respect to the "right" of the local community to choose its own officers—facts which are of especial significance when it is recalled that most of the cases asserting the doctrine of the right of local self-government have involved this specific right. Let it be remarked, then, that during the entire colonial period the mayor and the recorder of every borough (city) in the colonies, with the exception of the mayor of Elizabeth, New Jersey, and of both the mayor and recorder in the close corporations of Philadelphia, Norfolk, and Annapolis,[16]

[13]For a brief description of the development of local government during the colonial period see Fairlie, Local Government in Counties, Towns and Villages, Ch. II.

[14]Fairlie, Essays in Municipal Administration, pp. 50-60. There had been two paper incorporations in Maine prior to its absorption by Massachusetts, and the corporations of Germantown, Pennsylvania, and Trenton, New Jersey, had existed for a few years each.

[15]*Ibid.*, pp. 48-94.

[16]In the close corporations there were no popular elections. A limited number of corporators and their successors, chosen by coöptation, constituted the government. This could scarcely be called *self*-government except by a somewhat attenuated construction of the term.

were appointed by the governor of the colony.[17] Moreover, this method of appointment was introduced in some cities after the Revolution and was continued in a considerable number of cities well into the nineteenth century, as reference to the charters of the period discloses.[18]

Likewise the borough clerk was "usually appointed by royal commission through the governors of the provinces."[19] Indeed

[17]Judge Cooley in the Hurlbut case indicates and Judge Henderson in the Texas case of *Ex parte* Lewis unequivocally states that the city of New York was in respect to this matter of central appointment of the mayor distinctly exceptional.

[18]The mayor was subject to central appointment in all of the five cities of New York (New York, Albany, Hudson, Schenectady, and Troy) down to 1821. (N. Y. Constitution of 1821, Art. IV, sec. 10.) In Burlington, N. J. the mayor and recorder were appointed by the governor from 1733 to 1784, when a new charter was issued, which provided that the mayor, recorder, and aldermen should be appointed by the state council and the general assembly in joint assembly—a system which was not completely abolished until 1851. In New Brunswick, N. J. the mayor and recorder were appointed by the governor from 1730 to 1784, when a new charter was issued naming the first officers in the act itself and providing for the local selection of their successors; but a third charter, issued in 1801, provided for the appointment of mayor, recorder, and aldermen by the state council and general assembly, this system being continued until 1844. Appointment by the governor prevailed in Perth Amboy, N. J. from 1718 to 1784, when appointment of mayor, recorder, and aldermen by the state council and general assembly was introduced and remained until 1844. The close corporation which existed in Elizabeth, N. J. from 1740 was abolished in 1789 and a similar system of legislative appointment was introduced. Appointment by the governor existed in Trenton from 1746 to 1750, when the colonial charter was surrendered; the city was reincorporated in 1792 with the provision for legislative appointment of mayor, recorder, and aldermen—a system which was retained by the charter of 1837 but was finally abolished in 1844. Legislative appointment of mayor, recorder, and aldermen was likewise provided for Princeton, N. J., incorporated in 1813. In 1820 the system of naming the first officials in the charter and providing for local selection of their successors was provided in the charter of Jersey City; and again in the charter of Bordentown, incorporated in 1825. It was not until the incorporation of Camden in 1828 that a new city was launched in New Jersey upon the principle of local selection of officers from the beginning—a principle which likewise found expression in the Newark charter of 1836. (Paterson's Laws, *passim*, and Public Laws of New Jersey for the dates mentioned above.) In Lancaster, Pa. the mayor was subject to central appointment from 1742 to 1818; in Richmond, Va. from 1742 to 1782. The New Orleans charter of 1805 provided for the appointment of mayor by the territorial governor, as did also the Detroit charter of 1806. In 1784 five cities were incorporated by the legislature of Connecticut, (New Haven, Hartford, Middletown, New London, and Norwich) and in each of their charters the mayor, although chosen with the aldermen and councilmen by the freeholders of the city, held office for an indefinite term "at the pleasure of the general assembly." This system, which involved at least a considerable element of central control, was not abolished until the mayor was assigned a definite term of office by legislative enactment in 1825 (Hartford), 1826 (New Haven), 1829 (Middletown and New London), and 1831 (Norwich).

The list here given is probably not exhaustive of the instances of central appointment of municipal officers during the colonial and post-revolutionary periods.

[19]Fairlie, Essays in Municipal Administration, p. 72.

it may be said that for the most part the framers of our first state constitutions were unacquainted with the local election of any borough, or city, officers except the aldermen and the councilmen, or assistants. And when it is considered that there were in the cities of this period practically no administrative officers as we understand them today (with the possible exception of a treasurer or chamberlain) but that the mayor, recorder, aldermen, and councilmen constituted the entire official force of the city, it can scarcely be said that the "right" of local selection of local officers was well established and thoroughly understood. This, then, so far as municipal corporations proper were concerned, was the system of local self-government which the makers of the first state constitutions "had in view."

When we turn to examine the methods in vogue of selecting officers in the other existing units of local government, we are confronted with less uniformity than in the case of city officers but with none the less convincing proof of the fact that the "right" of local selection, far from being established, was subject to innumerable exceptions. It is true that in the New England towns the principle of local selection as applied to the executive officers of town governments was firmly fixed in law and in practice.[20] In New York and New Jersey, where the town was a factor of considerable importance in the county organization, this right of local selection of town officers was expressly guaranteed in the first constitutions of these States;[21] but these are the only instances of such guarantee in the constitutions of the Revolutionary period. As already indicated, however, the town was of practically no importance outside of New England, New York, and New Jersey, and did not exist at all in the South.

In respect to the manner of selecting county officers, both civil

[20]The Connecticut constitution of 1818 (the first constitution of that State) expressly incorporated this principle by the declaration that "each town shall annually elect selectmen, and such officers of local police as the laws may prescribe." Art. 10, sec. 2.

[21]"That town clerks, supervisors, assessors, constables, and collectors, and all other officers, heretofore eligible by the people, shall always continue to be so eligible, in the manner directed by the present or future acts of the legislature." N. Y. Constitution of 1777, Art. XXIX. Townships "at their annual town meetings for electing other officers, shall choose constables for the districts respectively;" and also three commissioners of tax appeals. N. J. Constitution of 1776, Art. XIV.

and judicial, the provisions of the first constitutions of the original thirteen States are sufficient to indicate the wide extent of the practice of central appointment. It is true that the principle of local election of such officers found some recognition in these constitutions.[22] But over against such provisions must be set the far more numerous provisions in which appointment of county officers by some central authority[23] was perpetuated by constitutional mandate.[24] In New York, where there was perhaps a larger degree

[22]Thus the constitution of Georgia (1777) provided that "all civil officers in each county shall be annually elected . . . except justices of the peace and registers of probate, who shall be appointed by the house of assembly" (Art. LIII). That of Maryland (1776) provided for an elected sheriff (Art. XLII). That of Massachusetts (1780) in defining incompatible offices referred to those filled by the election "of the people of any county" (Ch. VI, Art. II). That of New Hampshire (1776) required that a county treasurer and a recorder of deeds should be elected in each county. That of New Jersey (1776) provided for the election of a sheriff and one or more coroners in each county (Art. XIII). That of Pennsylvania (1776) declared that each county might elect representatives and "their other elective officers, as shall hereafter be regulated by the general assembly" (Sec. 18); and further provided that "commissioners and assessors, and other officers chosen by the people" should be elected, "as has been usual *until altered or otherwise regulated by the future legislatures of this state*" (Sec. 31). The constitution of Delaware (1776) contained provision for the local nomination of sheriffs and coroners, who were appointed, however, by the governor and council (Arts. XV, XVII). Similar provisions were found in the constitution of Pennsylvania (1776) for the selection of justices of the peace in each county and city and for the selection of sheriffs and coroners, although it was expressly stipulated that the legislature might change this mode of appointment (Secs. 30, 31).

[23]This authority was usually the governor and council, but in some instances it was the general assembly, while occasionally it was the governor with the assent of one or both houses of the assembly.

[24]Thus in Delaware it was a state authority that was empowered to appoint for each county judges and clerks of probate, registers in chancery, and clerks of the peace, while justices of the peace, sheriffs, and coroners were centrally appointed upon local nomination (Art. XII). In Georgia, the justices of county courts, justices of the peace and registers of probate were made subject to a similar method of appointment (Arts. LII, LIII); in Massachusetts, sheriffs, coroners, registers of probate, and all judicial officers, including justices of the peace (Ch. II, Sec. I, Art. IX); in New Hampshire, all civil officers of counties except the treasurer and recorder of deeds; in New Jersey, judges and clerks of the inferior courts of common pleas and justices of the peace (Art. XII); in Pennsylvania, registers of wills and recorders of deeds, while justices of the peace, sheriffs and coroners, were made subject to local nomination and central appointment (Sec. 34); in Maryland, registers of wills, all judges and justices, and "all other civil officers of government (Assessors, constables, and overseers of roads only excepted)" (Art. XLVIII; see also Art. XLVII); in Virginia, justices of the peace (who appointed constables), and sheriffs and coroners (upon nomination by the county courts); in North Carolina, justices of the peace (Art. XXXIII); in South Carolina, justices of the peace, all judicial officers, sheriffs, and until otherwise directed by the general assembly, all other necessary officers, except such as were by law directed to be otherwise chosen (Arts. XX-XXII).

of centralization than in any other State, all officers whose appointment was not otherwise provided for by the constitution were required to be named by a state council of appointment;[25] and while sheriffs and coroners were the only officers specifically mentioned in the constitution as being subject to this mode of appointment,[26] the list of local appointments made by this council included all mayors and recorders of cities, all judges, justices of the peace, county clerks and surrogates, masters and examiners in chancery, road inspectors, and numerous minor officials.[27]

Little further comment seems to be needed. It is obvious on the face of these historical facts that the system—or rather systems—of local government which the framers of our early constitutions "had in view" fell very far short of embodying as a principle the right of local selection of local officers. In fact, with the single exception of the New England town governments, if any principle can be said to have been preponderant, it was the principle of *central* rather than local appointment of local officers.

Apart from provisions regulating the mode of selection of certain local officers, the only other connection in which local governments were generally mentioned in these first constitutions was in the provisions relating to representation in the state legislature,[28] the qualifications for suffrage, and the conduct of elec-

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[25]Art. XXIII.

[26]Art. XXVI.

[27]McBain, "DeWitt Clinton and the Origin of the Spoils System" in Columbia University Studies, XXVIII, p. 79.

[28]Representation was based on "towns, cities, and places" in the Connecticut charter of 1662, which survived as the fundamental law of the State until the constitution of 1818, when the town became the unit of representation (Art. III, sec. 3). It was based on the counties in Delaware (Arts. III and IV); on counties and two towns in Georgia (Art. II); on counties and towns in Massachusetts (Ch. I, Sec. VI, Arts. I, II; Ch. VI, Art. X): on counties, the city of Annapolis, and the town of Baltimore in Maryland (Arts. II, IV, V, XLII): on counties, towns and parishes or "places" in New Hampshire; on counties in New Jersey (Art. III); on counties, cities, and on districts formed on the same in New York (Arts. IV, XII, XVI); on counties and towns in North Carolina (Arts. II, III); on counties and cities in Pennsylvania (Arts. 7, 12, 17, 19, 47); on towns and "each other place, town, or city" in the Rhode Island charter of 1663, which remained the fundamental law of the State until 1842; on parishes and districts in South Carolina (Arts. XI, XXVII); in Virginia on counties, the district of West Augusta, the city of Williamsburg, the borough of Norfolk, and other cities or boroughs allowed by the legislature.

tions.[29] In several of them mention was made of existing local units of government in some exceptional, and for our purposes here wholly unimportant, connection;[30] but in three instances constitutional clauses of this exceptional character are worthy of especial citation as bearing upon the intention of the framers in respect to the "rights" of local self-government. The constitution of New York, proclaiming that the charters of bodies politic granted by the king of Great Britain or his predecessors were not to be adjudged void, specifically declared that "all such of the officers described in the said charters respectively as, by the terms of the said charters, were to be appointed by the governor of the colony of New York, with or without the advice and consent of the council of the said king, in the said colony, shall henceforth be appointed by the council established by this constitution for the appointment of officers in this State, until otherwise directed by the legislature."[31] This provision, it will be noted, expressly continued the authority of the central government to appoint city officers, and expressly recognized the authority of the legislature to alter this method of appointment.

The constitution of Pennsylvania expressly vested in the general assembly the power to "grant charters of incorporation" and to "constitute towns, boroughs, cities, and counties."[32] This pro-

[29]A majority of the constitutions required the voter to be a resident of the county, town, or city which was to be represented in the legislature; and a number of them specified the officers who should conduct the elections, as the sheriff or justices of the peace in counties, the selectmen and town clerks in towns and the mayor, recorder, and aldermen in cities.

[30]Thus the constitution of Delaware opened with the declaration that the counties of New Castle, Kent, and Sussex should thereafter be known as Delaware State. The constitution of Georgia outlined the geographical boundaries of the several counties by enumerating the parishes which they embraced (Art. IV); it likewise provided in detail the organization and jurisdiction of county courts (Arts. XXXVI, XL, XLIV), and required counties to keep public records and to build court houses and jails when ordered by the legislature (Art. L). The constitutions of Massachusetts and New Hampshire prescribe the duties of "towns, parishes, precincts, and other bodies politic" in respect to the protestant religion (Bill of Rights, Mass., 1780; N. H., 1784.) Maryland required that all civil officers "to be appointed for counties" should be residents of such counties (Art. XLVI). The constitution of North Carolina declared that there should be a sheriff, coroner or coroners, and constables in every county, but the manner of their appointment was not fixed (Art. XXXVIII). Pennsylvania required that courts of justice should be established in Philadelphia and in each county and likewise schools in each county (Secs. 4, 44).

[31]Art. XXXVI.

[32]Sec. 9. The reason why this power was specifically conferred, instead of being left, as it was in most of the States, to be included by silent implication among the general reserved powers of the legislature, may doubtless be explained by the fact that in the proprietary colony of Pennsylvania the granting of municipal charters had been a prerogative of the

vision is of significance only as it indicates that the problem of municipal government was not ignored or forgotten by the makers of the constitution, and that, having this problem before them, they nevertheless signally omitted to write into the fundamental law of the State anything concerning the "rights" of local self-government—and this, at a period of our history when the writing down of rights was one of the most engrossing occupations of statesmen and politicians.

The declaration of rights[33] of the Maryland constitution contained a clause that sheds especial light upon the views that were entertained at the time on the subject of the "rights" of municipal corporations over against the legislature. This clause declared "that the city of Annapolis[34] ought to have all its rights, privileges and benefits, agreeable to its character, and the acts of assembly confirming and regulating the same, *subject nevertheless to such alteration as may be made by this convention, or any future legislature.*" The significance of this provision requires no comment.

From this somewhat extended review of the several connections, in which local governments find mention in the first constitutions of the American States, it seems obvious that, so far as express constitutional provisions are concerned, the instances in derogation of the principle of local self-government were far more numerous than those in recognition of such principle. It is likewise obvious that the framers of these constitutions did not have in view a reasonably uniform system of local government in which the practice of making a local selection of local officers was widely and firmly fixed. It is inconceivable, therefore, that they could have intended to incorporate into these constitutions by general implication the principles of a system with which they were by no means well acquainted.

Moreover, even if the premise of historical facts upon which this doctrine is founded were not so overwhelmingly oppositional,

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proprietor or of his agent, the governor, as in the royal provinces such authority had been a prerogative of the crown through its agent, the governor. The framers of the first constitution of Pennsylvania evidently thought it important to make specific note of this change from executive to legislative authority, although in most of the other States this change resulted of necessity, without constitutional mention, from the fact that the governor became immediately an officer who exercised only such powers as were expressly conferred upon him. This provision was omitted from the Pennsylvania constitution of 1790.

[33]Art. XXXVII.

[34]Chartered by Governor John Seymour in 1708.

there would remain the very substantial doubt as to the authority of the courts to write into the fundamental law of a State a prohibition upon legislative action founded upon *general* implication. There is no denying that our judicial opinions involving questions of constitutional law abound in discussions of the "general principles of our system of government," the "spirit of our constitutions," and the "nature of republican and free governments." For the most part, however, the courts have discussed such generalities in connection with the construction of constitutional provisions of an express or specifically implied character. It must be admitted that the doctrine of implied prohibitions, like the doctrine of implied powers under the national constitution, is firmly established in our constitutional law. The prohibitions, however, that have been held to arise out of constitutions by implication may be roughly separated into two comprehensive classes: those implied from some specific provision, either of positive requirement[35] or authorization, or of positive negation; and those which result from an aggregate of many specific provisions. Instances of the first class will readily occur to anyone acquainted with the American system of constitutional law. Instances of the second class of implied prohibitions are not numerous; but they are none the less important and substantial. Perhaps the best known instance of a prohibition of this character is found in the rule of law to the effect that the national government may not tax a necessary instrumentality of the state governments.[36] In the leading case upon this subject—*Collector* v. *Day*[37]—the court, speaking through Mr. Justice Nelson, declared that "upon looking into the constitution it will be found that but few of the articles in that instrument could be carried into effect without the existence of the states;" and the argument followed that, since an independent judicial department is essential to the existence of the States, the emolu-

[35]See note 40, *infra*.

[36]The correlative doctrine that a state government may not tax a means or instrumentality of the national government is specifically implied from the express declaration that the constitution, laws, and treaties of the United States shall be the supreme law of the land. Granted that Congress has the power to create any specific instrumentality, the law by which it is created operates to invalidate any state law that might interfere with its operation. "The states have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This, we think, *the unavoidable consequences of that supremacy which the constitution has declared.*" Marshall, C. J. in McCulloch *v.* Maryland (1819) 4 Wheat. 316.

[37](1870) 11 Wall. 113.

ments of judicial officers could not be taxed and the department thus impaired or even destroyed by the national government.[38]

Now in view of the fact that local governments were mentioned in one or more connections in even the earliest state constitutions, it is doubtless true that in most of the States the legislature would have found some difficulty in completely abolishing all local government and establishing in its place a system of government wholly centralized in character. On the other hand, since the principle of central control over local officers was to a very considerable extent placed upon a constitutional basis, the early constitutional provisions that stood in the way of complete centralization were in point of fact few and meagre.[39] Certainly it cannot be contended that the right of local self-government "resulted" from an aggregate of the limited number of provisions in which reference was made to local governments; and certainly it is difficult to see how an aggregate of other provisions of the constitution had any relation whatever to the right in question. In other words, it is not constitutional provisions of any character, either singly or in combination, in which the advocates of this doctrine claim to find an expression of the right of local self-government by general implication. They claim, on the contrary, that the implication is from a source wholly outside the constitution—from alleged historical facts showing the conditions of local government that prevailed at the time when these constitutions were framed. Even if these alleged historical facts were unimpeachable—which they are not—there remains the large question whether, under the broadest possible conception of our system of judicial review, it can be said that we have vested our courts with competence to declare laws void upon "general implications" that are founded neither upon

[38]Moreover, in addition to this line of reasoning, the court pinned this prohibition to a specific provision of the constitution, declaring that the power to maintain a judicial department of government unimpaired is among those powers *expressly* reserved to the States by the tenth article of amendment.

[39]At a comparatively recent date, Chief Justice Morton, in construing in this respect the early constitution of Massachusetts (which even today has been only moderately modernized by process of amendment), declared: "While the constitution recognizes our system of town government as an inherent part of our general system of government, so that the legislature could not abolish the town system of government without coming in conflict with some parts of its provisions, yet in most respects it leaves the power and duty of providing laws for the government of the towns and cities in the discretion of the legislature." Commonwealth *v.* Plaisted (1888) 148 Mass. 375, 19 N. E. 224. It may be remarked, also, that whatever constitutional basis has been given to towns in Massachusetts has been introduced almost wholly by amendments to the constitution of 1780.

the positive requirements of the constitution (which may undoubtedly imply prohibitions[40]) nor upon an aggregate of its provisions.[41]

4. In answer to the contention that the right of local self-government is one of those rights guaranteed by the declaration that the constitutional enumeration of a list of specific rights "shall not be construed to impair or deny others retained by the people," it may be said in the first place, that a reserve clause of this character was not incorporated into the bill of rights of a single constitution of the revolutionary period. It was first intro-

[40]In Commonwealth *v.* Moir (1901) 199 Pa. 534, at p. 554, 49 Atl. 351, Mitchell, J., quotes from the opinion rendered in Page *v.* Allen (1868) 58 Pa. 338, at p. 346, a suppositious illustration of the kind of legislation that would violate the "spirit" of the constitution and would be void by "general implication." The illustration selected was of an act providing for the election of two governors instead of only one, as required by the constitution. It would seem that such an illustration is wholly inapt. The act in question would be void, not merely because of a general implication referable to the spirit of the fundamental law, but because it would be clearly prohibited by a specific implication referable to the positive provision establishing the office of governor. As was said in People *ex rel.* Wood *v.* Draper (1857) 15 N. Y. 532, at p. 544: "But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government; the grant of the legislative power itself; the organization of the executive authority; the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though the negative were expressed in each instance."

[41]In general denial of the doctrine of an inherent right of local self-government and in specific denial of the competence of the courts to declare laws void on general implication, see the able argument of Garrison, J., in Attorney General *ex rel.* Booth *v.* McGuinness (1909) 78 N. J. 346, pp. 374-375, 75 Atl. 455. With convincing logic he reasons that, if the courts must resolve permissible doubts in favor of the validity of statutes even when construing the written language of the constitution, with much greater force must this rule apply, "when, with no determinate matter before them, and with no established rules or uniform sources of information for their guidance, judges are asked to declare an act invalid because of an inference that may be drawn from sources historical, literary, or political, *aliunde* the constitution, in support of the argument that such act is at variance with the spirit that animated the framers of the constitution and hence must be judicially declared to pervade that instrument and to be perpetuated by it although unexpressed in its provisions." While not suggesting that an historical investigation was "so essentially unjudicial in character as to put the whole matter out of court," the learned judge was nevertheless—and quite correctly it would seem—of the opinion that "the doubt that must inevitably exist as to the conclusive correctness of any such inference drawn from extra-constitutional sources is sufficient to determine our judicial action under the rule stated by Marshall that 'in no doubtful case would a court pronounce a legislative act to be contrary to the constitution.'"

duced into state constitutions at a much later date,[42] having been copied doubtless from the provision of similar import found in the ninth amendment of the federal constitution.[43] In the second place, it may be noted that from the context in which this declaration is ordinarily found, it obviously relates to personal and property rights rather than to political and governmental rights.[44] While municipal corporations are of course artificial persons, it can scarcely be said that the right of local self-government is in all respects assimilable to the right of trial by jury, or of freedom of speech, or of due process of law. In the third place, it may be remarked that although this vague and indeterminate clause found lodgment in a federal amendment of 1790 and was in later times incorporated into many state constitutions, it has received practically no judicial interpretation or application. Certainly if it is to be construed as setting up a series of substantive rights that may be invoked in the courts as an adequate bar to legislative enactments, it must be admitted that there is no limit of any kind, either in law or in reason, upon the authority of the courts to substitute their own opinion in matters of public policy for that of the legislative branch of the government. Practically any law may be thrown out of court upon the ground that, in the opinion of the court, it encroaches upon some right retained by the people.

American judges have already found themselves subjected to no small criticism because of the far-reaching negative authority

[42]Examining only the constitutions of the original thirteen States, we find such a clause for the first time in the Rhode Island constitution of 1842. It found place in the New Jersey constitution in 1844, in that of Maryland in 1851, of Georgia in 1865, of North Carolina and South Carolina in 1868, and of Virginia in 1870. It has never been incorporated into the bill of rights in Massachusetts, Connecticut, Delaware, New Hampshire, New York or Pennsylvania.

[43]Commenting on this clause as embodied in the amendment to the federal constitution, Mr. Justice Story declared (On the Constitution, 5th ed., sec. 1905) that it "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies." The amendment, he concluded, was undoubtedly suggested by the reasoning of the Federalist (no. 83) to the effect that a bill of rights in the national constitution was not only not necessary but was also positively dangerous, since it would seem to imply that the rights not expressly reserved were yielded up to the will of the government.

[44]"This manifestly refers to personal, and not to governmental, rights. For full governmental powers were by this instrument conferred upon the government thereby established." Attorney General *ex rel.* Booth *v.* McGuinness (1909) 78 N. J. L. 346, 75 Atl. 455.

which they exercise in the making of laws, especially through the necessity forced upon them of construing and defining such broad and uncertain phrases as "due process of law" and "equal protection of the laws." If there be fault in the exercise of such power by the courts, it would seem to lie more largely in the system itself than in the judges, who, under the system established, cannot refuse to construe and apply. But the vagueness and elasticity of such expressions as "due process of law" and "equal protection of the law" are as nothing compared with the indeterminateness of the "rights retained by the people." As has been remarked:[45]

"If it [*i. e.*, the principle that whatever the courts may conceive to be the spirit of the constitution is to be regarded as a part of the fundamental law] is to be acquiesced in and accepted as a rule of construction, the constitution of the state is to be fully known only by studying the theory of the judges who are chosen to expound it; and it will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court, and the limitations upon legislative power will be as unknown and unknowable as were the rules of equity in the days when the Chancellor's conscience was the law of the land."

It seems reasonable to conclude that every one of the four arguments that have been advanced in support of the doctrine of an inherent right of local self-government is fatally defective in character. However salutary the application of such a doctrine might have been in the course of the evolution of relations between state legislatures and municipal corporations in the United States, it seems clear that upon careful analysis the entire line of reasoning by which it has been sought to be sustained is resolved into a thin tissue of legal sophistication.

"It must now be conceded," said Judge Dillon,[46] "that the great weight of authority denies *in toto* the existence, in the absence of special constitutional provisions, of *any inherent right of local self-government which is beyond legislative control.*" There is no question whatever that this is a correct statement of the law upon this subject. The contrary rule is not only unsupportable in theory but is also distinctly exceptional in application. The opinion of Mr. Justice Hunt in the case of *Barnes* v. *District of Columbia*[47] was quoted by Judge Dillon in this connection and may perhaps be

[45]Redell *v.* Moores (1901) 63 Neb. 219, at p. 231, 88 N. W. 243.

[46]Municipal Corporations, (5th ed.) I, p. 154.

[47](1876) 91 U. S. 540.

taken as a typical judicial expression of the accepted rule. He said:[48]

"A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not view its acts as sometimes those of any agency of the State, and at others those of a municipality; but that, its character remaining at all times the same, it is great or small according as the Legislature shall extend or contract its sphere of action."

The absoluteness of the power of the legislature over municipal corporations, except in so far as such power may be limited by express constitutional provision, could scarcely be expressed in more sweeping terms. The learned judge did not, of course, mean to say that the distinction between the city in its local capacity and in its capacity as an agency of the State has no recognition at all in the law of municipal corporations. The cases to the contrary, involving, for example, questions of the tortious liability of municipal corporations or of the interpretation and application of specific constitutional provisions, are well known and numerous. He simply declared that so far as the power of the legislature over municipal corporations is concerned, in the absence of any specific constitutional guarantee, this distinction has no place whatever in our law. However outrageously impolitic and prejudicial to local public interests a particular legislative enactment may be, there is nothing in the fundamental principles of our system of government to justify interference by the courts. The remedy for such legislation, like the remedy for many other enactments that are as clearly constitutional as they are clearly unwise and pernicious, lies at the polls.

It should enlist no comment that the courts, in giving expression to the doctrine that the authority of the legislature over municipal corporations is (in the absence of constitutional restriction) supreme, have seldom seen fit to enter upon extended arguments in respect to the legal basis of the doctrine. Such a doctrine is, as already indicated, merely the application to municipal corpora-

[48] p. 544.

tions of the well-known principle that the state constitutions are not a grant of powers, and that the legislative power conferred by these instruments is *all* legislative power that is not expressly or impliedly prohibited by the state or the national constitution. Impressed with the wisdom of seeking limitations upon legislative power only in the fairly clear implications of the constitution and not in those implications which, being both general and vague, must find support wholly outside of the fundamental law, in alleged historical considerations or in the abstractions of political theory, the courts have naturally not gone out of their way to make inroads upon a firmly settled principle of constitutional interpretation; nor have they thought it necessary to explain the whys and wherefores of a doctrine which is so obviously covered by this principle. An elaboration of the reasons for the rule of legislative supremacy over municipal corporations would be merely the iteration of a principle of constitutional law so universal and so fundamental as to be axiomatic and trite. It is, therefore, a vain search to discover expressions of judicial opinion in elaboration of the reasons for this doctrine. The most that can be found is a few cases in which the opinion of the court is devoted to arguments in refutation of those advanced in support of the contrary doctrine.[49]

The doctrine of legislative supremacy over municipal corporations has often been enunciated merely in the course of the introduction to opinions[50] and has been omitted entirely from innumerable opinions in which it might have been expressed. This has been due to the fact that in most jurisdictions the doctrine of an inherent right of local self-government has never been urged upon the courts, and there has been, in consequence, little occasion for the discussion or even the expression of a rule in respect to which no controversy was raised. It must be remembered, moveover, that since many of the more modern state constitutions have given *express* recognition to certain rights of municipal corporations over

[49]Such, for example, as the dissenting opinion in State *ex rel.* Attorney General *v.* Moores (1898) 55 Neb. 480, 76 N. W. 175, which is adopted as the affirmative opinion in Redell *v.* Moores (1901) 63 Neb. 219, 88 N. W. 243, the opinion in Brown *v.* Galveston (1903) 97 Tex. 1; and in Attorney General *ex rel.* Booth *v.* McGuinness (1909) 78 N. J. L. 346, 75 Atl. 455.

[50]It is doubtless because of this fact that Mr. Amasa M. Eaton regards the rule as having been asserted by American courts for the most part in the nature of dictum. (1902) 25 Rep. Am. Bar Assn., p. 291. To sustain or refute this contention would necessitate an extended analysis of the lines of argument pursued in many cases. The distinguished commentator did not present such an analysis in support of his contention; and the limits of this paper do not warrant a detailed refutation. It would probably not be difficult to show that the contention is wholly without merit.

against the legislature—a fact which in itself is eloquent of the non-existence of inherent rights—the attention of the courts in cases involving the validity of statutes relating to cities has been increasingly directed to the interpretation and application of these specific constitutional provisions.

It seems certain that the doctrine of an inherent right of local self-government was never enunciated by any American court prior to the year 1871.[51] The entire history of legislative practices in this country both before and after that date stands as perhaps the most monumental and convincing refutation of the doctrine in question. May it not be said that, for utilitarian purposes, a rule of constitutional law finds in the uninterrupted legislative practices of more than a century far stronger support than in any amount of repetitious expression in the books? Of such character is the rule which asserts the absolute supremacy of the legislature over the "rights" of municipal corporations in the absence of constitutional restriction in point. Even in Indiana, Kentucky, and Iowa, where the contrary rule has been applied, it cannot be said that cities have in fact enjoyed any larger measure of immunity from legislative domination than have the cities of other States under similar constitutional status.

In conclusion mention should doubtless be made of a doctrine that is somewhat closely akin to that of an inherent right of local self-government. It has been asserted in one or two jurisdictions that, even in the absence of constitutional provisions in point, a municipal corporation is protected against the authority of the legislature to vest certain municipal powers in officers who are not chosen by the direct suffrage of the local electorate. This doctrine is perhaps best set forth in the Iowa case of the *State* v. *Des Moines*,[52] where there was drawn into question the validity of an act that vested in a board of library trustees appointed by the mayor and council of the city the power, within certain limits fixed by the act, to determine the amount of the annual tax levy for library purposes. Although there was no provision of the constitution that either expressly or impliedly prohibited such investment of power, it was contended, and the contention was sustained by the court, that the power of local taxation could be vested only in corporate authorities who were subject to direct

[51] This was the date of the Michigan case of People *ex rel.* Le Roy *v.* Hurlbut, which, as previously indicated, can scarcely be said to have been decided by an application of the doctrine. 16 Columbia Law Rev. 192-196.

[52] (1897) 103 Iowa 76, 72 N. W. 639.

election. The court relied upon the opinion as expressed by Judge Cooley in his treatise on Taxation[53] to the effect that the legislature, in making a delegation of the taxing power to a municipal corporation, "must make it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation." Support was also sought in the opinions expressed in certain Illinois and Kansas cases, in which, however, specific constitutional provisions were under construction.[54] Without attempt-

[53](2nd ed.), pp. 61, 63, 65.

[54]The Illinois constitution of 1818 declared that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes" (Art. IX, sec. 5). In a series of cases construing this provision, the Illinois court held that this clause prevented the legislature from vesting the power to tax "for corporate purposes" in any other authority than the "corporate authorities" of the municipal corporations named; as, for example, in a park commission the members of which were appointed by the legislature; People *v.* Chicago (1869) 51 Ill. 17; or in a private drainage company; Howard *v.* The Drainage Co. (1869) 51 Ill. 130; or in a police commission appointed by the legislature; Hines *v.* People (1879) 92 Ill. 406. See also Updike *v.* Wright (1876) 81 Ill. 49; People *v.* Morgan (1878) 90 Ill. 558. In several of these cases the court declared that the "corporate authorities" meant by this provision were "those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they had given their assent;" but in none of them was a law voided which vested the taxing power in an authority subject to *local* appointment. Apparently that question was never raised under the provision.

The Kansas constitution of 1859 declared that "the legislature may confer upon the tribunals transacting the county business of the several counties, such powers of local legislation and administration as it shall deem expedient" (Art. II, sec. 21); and further that "provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power" (Art. XII, sec. 5). Both the Kansas supreme court and the federal circuit court, in construing these provisions, held that they operated to prevent the legislature from delegating the taxing power to any other agencies than those named in the provisions; to wit, the tribunal that transacts the county business, or the corporate authorities of a city, town, or village. Board of Commissioners *v.* Abbot (1893) 52 Kan. 148; Parks *v.* Board of Commissioners (1894) 61 Fed. 436. Said the federal court, in declaring void an act vesting the taxing power in a board of road commissioners appointed by the county commissioners upon petition of a majority of the landowners along any road: "There is nothing in either of the sections to authorize the delegation of the power to tax, or the power to make these special assessments to the signers of these petitions for the improvement, nor to the road commissioners. Neither of these bodies is the tribunal that transacts the county business, nor is the improvement within any organized city, town or village. The constitution not having authorized the legislature to so delegate the taxing power, no such authority existed." This was, as expressly stated by the court, on the theory that the grant of power contained in these provisions "precluded any implication of the authority to delegate the power of taxation to any other agencies than those named." In both cases the court had a good deal to say about the right of self-taxation; but obviously reference was to the right as the court construed it to be implied in these specific constitutional provisions.

ing to locate the constitutional implication asserted, the court declared as follows:[55]

"We say then that there is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. Whatever the effect of the constitutional provisions in Illinois and Kansas may be, the reasoning of the cases is in line with the views expressed by Judge Cooley, and it is equally applicable to cases where there are no express constitutional limitations. * * * If the power to tax may be by them [the legislature] vested in a board of library trustees, against the will of the people, it may be reposed in any other body which is not directly responsible to the people."

Having demonstrated that the people had never given their consent to the exercise of this power by these trustees, the court held that their appointment by the elected mayor and council was not equivalent to their selection by the people.

In a Tennessee case—*Pope* v. *Phifer*[56]—an act that vested the power of county taxation in a board of three commissioners appointed by the governor was held void on similar, among other, grounds. "Can it be believed for a moment," asked the court, "that the power was ever intended to be delegated to the legislature to authorize such a body, so appointed and constituted, to perform the functions assigned to them in this act? We think no reasonable man can come to such a conclusion."

In at least one case the Michigan court gave voice (in a wholly different connection, however) to this doctrine of an "inherent right of local election." In *Attorney General* v. *Board of Councilmen of Detroit*[57] an act was declared void which provided for the appointment by the mayor and council of a bi-partisan election commission vested with power to appoint the election officers in the several wards of the city. The opinion recited:[58]

"Here the choice of ward officers is made, not by the people of the ward, nor by the chosen officers of the city, but by persons who are themselves appointees of a part of the city government. No

[55] 103 Iowa at p. 89.

[56] (Tenn. 1871) 3 Hask. 682.

[57] (1885) 58 Mich. 213, 24 N. W. 887.

[58] p. 220. The act was held invalid also on the ground that the bi-partisan principle was by specific implication forbidden by the constitution.

doubt there are ministerial powers which can be deputized. But a governing body cannot deputize others to perform its governing functions, and the Legislature cannot authorize it to do so without destroying the character of the corporation, which is required to be preserved."

It seems scarcely worth while to discuss at length the wholly unusual doctrine applied in these cases. So far as the delegation of the power of taxation is concerned, it may be said that immemorial custom has firmly established, as an exception to principle that the legislature may not delegate such power, the authority of the legislature to make such delegation to municipal corporations. It may be said, further, that in practice the taxing power has been, and is, usually vested in *elected* officers of the corporation. But the exceptions to this practice have been numerous in the past and are by no means unknown in the present.[59] If it is a sound doctrine of our constitutional law that the taxing power may be delegated only to the elected officials of a municipal corporation, it seems somewhat strange that the many instances in which that principle has been violated in practice have gone wholly without challenge.

[59]Thus in the early American city the mayor and recorder, who were, as already indicated (*supra*, p. 304), usually appointed by the central government, always participated in the exercise of the local taxing power. In most of the cities of New Jersey the taxing power was until the fifth decade of the nineteenth century largely in the hands of officials named by the state legislature. (Note 18, *supra*). In the history of American cities there have been numerous instances in which state appointed commissions have been vested with authority to undertake some specific municipal public work or have been placed in charge of some regular branch of municipal administration. In many of these instances such commissions have been vested with full authority to requisition the municipal council to levy taxes for the support of their work or department, in precisely the manner that was in the Des Moines case denied to the library trustees. Nor are examples lacking in which officials subject to local appointment have been vested with a share of the taxing power of the corporation. Thus from 1871 to 1893 the president of the department of taxes and assessments, one of the four members of the powerful board of estimate and apportionment of New York City, was an appointed official. In the latter year another appointed official, the corporation counsel, was added to this board; and it was not until the charter revision of 1901 that the board was made to consist wholly of elected officers. In Rochester and in all New York cities of the second class (Albany, Schenectady, Syracuse, Troy, Utica, and Yonkers) two of the five members of a similar board (the corporation counsel and the city engineer) are still appointed by the mayor. In Baltimore the city engineer and city solicitor, two of the five members of a similar board, are likewise subject to local appointment. In second class cities of Indiana (Evansville, Fort Wayne, South Bend, and Terre Haute) the comptroller, an officer appointed by the mayor, makes all estimates for city expenditures, which the council may diminish but not increase. It seems useless, however, to multiply the illustrations.

As for the application that was given by the Michigan court to the doctrine of the right of local election, it is manifest that, carried to its logical conclusion, it would lead to a complete revolution of most city governments in the United States. Stated broadly, it is nothing more nor less than a declaration that, under some vague and general theory underlying our system of constitutional government, only ministerial functions may be delegated to *appointed* officers; for it is difficult to see how the functions of an election commission and election officials appointed by such commission can be distinguished in kind from the functions of a host of other appointed boards and officers. It is sufficient to remark that the doctrine as thus stated is not even supported by usual practice, as is the case in respect to the delegation of the taxing power. On the contrary, it is utterly refuted by the whole existing order of things political in the United States.

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